1987

Darell Kelson, personal representative of the Estate of Darin Kelson, deceased, Plaintiff and Appellant, v. Salt Lake County, a political subdivision of the State of Utah; and Perry Buckner, in a representative capacity only, Defendants and Respondents : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DARRELL KELSON, personal representative of the Estate of Darin Kelson, deceased,	:	
Plaintiff-Appellant,	:	
v.	:	Appeal No. 870106
	:	14B
SALT LAKE COUNTY, a political subdivision of the State of Utah; and PERRY BUCKNER, in a representative capacity only,	:	
Defendants-Respondents.	:	

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Michael R. Murphy, District Judge, Presiding

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ISSUES PRESENTED FOR REVIEW

1. Whether, under former U.C.A. § 78-27-37 (1973), applicable to this action, the trial Court properly instructed the jury that the negligence of appellant's decedent should be compared to that of the respondents for purposes of determining liability and damages.

2. Whether the trial Court erred in ruling that the siblings of Darin Kelson could not recover damages under Utah's Wrongful Death Act.

3. Whether the trial Court abused its discretion in refusing to grant appellant relief from a Stipulation concerning the alleged blood alcohol content of Darin Kelson at the time of his death.

These issues were all briefed and argued several times before the trial Court. Judge Murphy instructed the jury that Darin Kelson's negligence should be compared to that of defendants. The jury subsequently apportioned liability 25% to defendant Buckner and 75% to Darin Kelson, on which basis the Court entered its judgment NO CAUSE OF ACTION. The Court also ruled, as a matter of law that the siblings of Darin Kelson were not entitled to recover for his wrongful death; and permitted the Stipulation complained of to be read into evidence.

The issues presented on appeal are all questions of law which may be resolved by this Court without reference to transcripts of the pleadings below.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

1. Former Utah Code Ann. § 78-27-37 (1973, repealed 1986), provided:

COMPARATIVE NEGLIGENCE - DIMINISHMENT OF DAMAGES - "CONTRIBUTORY NEGLIGENCE" INCLUDES "ASSUMPTION OF THE RISK."

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. As used in this Act, "contributory negligence" includes "assumption of the risk."

STATEMENT OF THE CASE

This appeal involves a wrongful death action brought by Darrell Kelson, as personal representative of the heirs of Darin Kelson, against Salt Lake County and Police Officer Perry Buckner. The matter was tried to a jury with Judge Michael R. Murphy, Third District Court, Salt Lake County, presiding. On

January 29, 1987, the jury returned a Special Verdict finding that the conduct of both Buckner and Kelson proximately caused the death. The fault was attributed 25% to Buckner and 75% to Kelson. Having previously ruled that the negligence of appellant's decedent should be compared to that of respondents, judgment for respondents was duly entered on February 4, 1987.

FACTS RELEVANT TO THE ISSUES ON REVIEW

A. With Respect To The Contributory Negligence Issue:

1. The heirs of Darin Kelson did not cause or contribute to the cause of his death in any way.

2. Nevertheless, the trial Court instructed the jury that the negligence, if any, of Darin Kelson should be compared to that of respondents in determining whether, and what amount of damages could be recovered by his parents. (See, Instruction Nos. 32 and 33 attached hereto as Exhibit A.)

3. The Special Verdict Form also required the jury to determine the percentage of Darin Kelson's negligence and compare it to that of respondents as a prerequisite to determining damages. (See, the Special Verdict attached hereto as Exhibit B.)

B. With Respect To The Blood Alcohol Stipulation Issue:

1. Appellant was originally represented by Robert DeBry and Associates.

2. Mr. DeBry, without appellant's authorization or permission, transferred the case to Robert B. Hansen.

3. From the outset of his "representation" of appellant, Mr. Hansen was antagonistic and argumentative with the appellant concerning the case.

4. Mr. Hansen was told repeatedly and continually by appellant and his family that Darin Kelson had not been drinking and was not intoxicated at the time of the collision. The family wanted that issue litigated to the fullest extent. [See, letter dated July 26, 1985, from Robert Hansen to Darrell Kelson attached hereto as Exhibit C. Note that no disclosure of the Stipulation is made therein.]

5. Nevertheless, on February 19, 1985, Mr. Hansen, without the knowledge, consent or authorization of his clients, and in fact against the express directions of his clients, entered into a Stipulation, the effect of which was to admit that Darin Kelson was intoxicated at the time of the collision. [See, Affidavits of Robert Hansen and Darrell Kelson, attached hereto as Exhibits D & E.]

6. Mr. Hansen received absolutely nothing in exchange for the Stipulation.

7. Because appellant was concerned about Mr. Hansen's "representation", Darrell Kelson sent a letter to Mr. Hansen on April 25, 1985, instructing Mr. Hansen to do nothing on the case without his express permission. Even though the Stipulation had been executed at the time, Mr. Hansen did not inform appellant of its existence or its impact on the case. [See, letter attached hereto as Exhibit F.]

8. Mr. Hansen withdrew from the case on August 21, 1985, without disclosing the existence of the Stipulation to appellant.

9. Appellant then learned that Mr. Hansen had never performed any substantive work on the case. After nearly a year on the matter, Mr. Hansen wanted to bill appellant for the three hours of work he had done on the case. [See, letter from Robert Hansen to Darrell Kelson dated August 26, 1985, attached as Exhibit G.]

SUMMARY OF ARGUMENT

The Comparative Negligence Statute applicable to this action, U.C.A., § 78-27-37 (1973, repealed 1986), provides in relevant part:

> [A]ny damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.

Under this unambiguous language, the damages recoverable by a decedent's heirs in a wrongful death action can not be diminished by any negligence attributable to the decedent.

Further, the Utah Supreme Court has unequivocally held that an action for wrongful death brought by or on behalf of a decedent's heirs is not derivative to an action which is or could be brought by the decedent or his estate. Hull v. Silver, 577 P.2d 103, 104 (Utah 1978). In every jurisdiction that has ruled on the issue, those with non-derivative actions have held that damages recoverable by a decedent's heirs cannot be diminished by any percentage of negligence attributable to the decedent.

During pre-trial motions, the Court ruled that Darin Kelson's siblings were not eligible to recover damages under the Utah wrongful death statute. The only justification for this position is a literal application of the term "heirs" found in the Probate Code, which is totally irrelevant to a wrongful death action. Moreover, it is illogical to deny damages to persons resulting from the wrongful death of an immediate family member.

Finally, the trial judge refused to grant appellant relief from a Stipulation concerning the alleged blood alcohol content of Darin Kelson at the time of the collision. The Stipulation was executed by former counsel without appellant's knowledge, consent or authorization. It involves the single most damaging piece of "evidence" presented by the respondents. Under the

circumstances, it was an abuse of discretion for the trial Court to admit the Stipulation and constituted prejudicial reversible error.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE NEGLIGENCE OF APPELLANT'S DECEDENT DARIN KELSON, SHOULD BE COMPARED WITH THAT OF RESPONDENTS IN A WRONGFUL DEATH CASE.

At trial, the jury was instructed that under Utah's Comparative Negligence Act, the negligence of Darin Kelson should be compared to that of respondents in determining liability and damages. That instruction was contrary to the law and constituted reversible error.

A. The Language Of Former U.C.A. § 78-27-37 Unambiguously Prohibits Damages Awarded A Decedent's Heirs In A Wrongful Death Action To Be Diminished By The Proportion Of The Decedent's Negligence.

Utah's Comparative Negligence Statute[1] passed in 1973 states unequivocally that "any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person

[1] The Statute was repealed in 1986. However, since the events that are the subject of this appeal occurred in 1983, the former statute applies. Note however, that even the present § 78-27-38 (1986) provides: "The fault of the person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. [Emphasis added.]

recovering." In this case the persons recovering are the heirs of Darin Kelson, his parents. They were not negligent, and their recovery cannot, under the plain language of the statute, be diminished by the negligence of someone else.

B. Recovery Of Damages By Heirs In A Wrongful Death Action Cannot Be Reduced By The Proportion Of Negligence Attributable To A Decedent In Jurisdictions Which Hold That Such Actions Are Non-Derivative.

1. The Utah Supreme Court Has Held That Wrongful Death Actions Are Not Derivative.

In Hull v. Silver, 577 P.2d 103, 104 (Utah 1978),[2] the Utah Supreme Court stated that a wrongful death action is not derivative. Rather, it is a new and independent action, separate and distinct from any cause of action the decedent may have had, which belongs exclusively to the decedent's heirs.[3] The damages recoverable are those suffered by the heirs. No recovery is allowed under the wrongful death statute, U.C.A. § 78-11-7, for any injuries or damages suffered by the decedent, nor does any part of the recovery pass through the decedent's estate. Switzer v. Reynolds, 606 P.2d 244, 247 (Utah 1980).

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[2] In Hull, the Court held that since a wrongful death action is not derivative, such an action brought by a deceased's heirs is not subject to the defense of interspousal tort immunity.

[3] Contrast any recovery under Utah's "Survival Statute," U.C.A § 78-11-12. There, the personal representative may claim and recover damages suffered by the decedent prior to his death. These damages belong to the decedent's estate and would be diminished by the percentage of decedent's contributory negligence, if any.

2. Pre-1973 Utah Decisions Barring Recovery By Heirs Where The Decedent Was Contributorily Negligent Are Irrelevant.

Counsel for respondents and the trial Court below relied exclusively on Van Wagoner v. Union Pacific Railroad Company, 112 Utah 189, 186 P.2d 293 (1947), for the proposition that the contributory negligence of a decedent may be applied to reduce the recovery of his heirs in a wrongful death action.

It should be enough to point out that Van Wagoner pre-dates the enactment of the Comparative Negligence Statute which is the controlling law applicable to this case. However, some confusion occurs because Van Wagoner was cited, seemingly with approval, in Hull. Careful analysis of the context of Hull and its language dispels that confusion.

It is true that prior to the adoption of comparative negligence in 1973, contributory negligence on the part of the decedent was a complete bar to an action by his heirs. However, and this is the key point: The basis for that result was not that the decedent's negligence was attributed to the heirs; rather, under the law as it existed, the decedent's contributory negligence rendered the tortfeasor's conduct not wrongful.

In Van Wagoner the Court stated:

> The right of action running to appellants in this case is founded on the same unlawful acts of the defendant, but the loss and damages suffered by them arise out of the death of the deceased. The legislature has thus said the right of action vests in the heirs-at-law if

> death ensues but it does not say the rights of third parties are modified, altered or changed. On the contrary, it bases recovery on the wrongful death by another and wrongful is used in the sense of wrongful as against the deceased, and does not include those situations where the deceased solely or proximately contributes negligently to his own death.

[Van Wagoner, supra, 112 Utah 218-219, 189 P.2d 701 (emphasis added).] See also, Johnson v. Ottomeier, 45 Wash.2d 149, 275 P.2d 723 (1954), cited in Hull, supra, at 105; which held:

> The statutory basis for recognizing defenses of this character [(i.e.) contributory negligence], is to be found in the word 'wrongful' as used in the statute. If the tortfeasor breached no duty owing to decedent, or if decedent proximately contributed, through consent, negligence, or unlawful acts, to his own injury, it is reasonable to say that his death was not wrongful in the contemplation of the statute. (emphasis added.)

Thus, prior to 1973, heirs could not recover under Utah's wrongful death statute even if the decedent was only 1% negligent, because any negligence on the part of the decedent rendered the defendant's acts not wrongful under the statute.

Adoption of the Comparative Negligence Act changed all that. After 1973, a plaintiff could recover even if his own negligence contributed to his injuries to an extent less than 50%. Consequently, in a wrongful death action, the tortfeasor's conduct would still be considered wrongful even if the decedent contributed to his own death. More important however, the 1973 Comparative Negligence Act eliminated any consideration of the

decedent's negligence in a wrongful death action with the language: "Any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering." Consequently, decisions by the Utah Supreme Court prior to 1973 barring recovery by heirs in wrongful death actions when the decedent was contributorily negligent are irrelevant and of no value as precedent in this case..

So far as appellant has been able to determine, no case decided by the Utah Supreme Court since 1973 has addressed the issue presented in this appeal.[4] Appellant contends that the law

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[4] But see, Phillips v. Tooele City Corp., 28 Utah 2d 233, 500 P.2d 669 (Utah 1972). There, plaintiffs brought an action to recover property damages to their vehicle which had been involved in a collision while driven by their minor daughter. At trial, the jury determined that the minor driver had been contributorily negligent. The trial court imputed that negligence to the plaintiffs as a matter of law and barred their recovery.

On appeal, the Utah Supreme Court rejected the imputation of negligence and remanded the matter for a new trial to determine the negligence of the defendant, if any, and damages. The Court relied on its interpretation of Sizemore v. Bailey's Administrator, 293 S.W.2d 165-168-69 (Ky. 1956), to the effect that:

> Since the statute [U.C.A. § 41-2-10] did not specifically provide that the contributory negligence of a minor would preclude recovery for damages inflicted by a third party, the court declined to read in by judicial fiat such a provision. [Id. at 673.]

The Court held:

> However, the legislative policy to broaden liability for the protection of an injured plaintiff gives no support to the doctrine of imputed contributory negligence which narrows the liability of a negligent defendant to a plaintiff, who is innocent of actual negligence. [Id. (emphasis added).]

The Phillips decision is important here since it underscores this Court's by now thorough rejection of the doctrine of imputed negligence, and because it is actually consistent with appellant's position in this case.

is crystal clear; The negligence of Darin Kelson can not be compared to that of the respondents in this action for the purpose of barring or diminishing the damages recoverable by his heirs.

3. The Law In Other Jurisdictions is Unanimous. Where Actions for Damages to Family Members Resulting From Injury or Death to Another are Held to be Non-Derivative, the Negligence of the Deceased or Injured Person is Not Applied to Bar or Reduce the Recovery By His Family.

In every jurisdiction which holds that wrongful death actions or claims for loss of consortium due to injuries of a family member are non-derivative, it is also held that the negligence of the decedent or injured party cannot be applied to diminish or defeat the independent claims of those entitled to recover.

The cases that follow are highlighted as examples of decisions from jurisdictions with case and statutory law similar to Utah.[5]

a. Feltch v. General Rental

In Feltch v. General Rental Company, 421 N.E.2d 67 (Mass. 1981), an injured worker and his wife brought suit for personal injury damages and loss of consortium respectively. The jury

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[5] Many of the cases cited in support of appellant's position involve claims for loss of consortium due to an injury to a spouse or family member. Utah does not allow loss of consortium claims resulting from injuries, as opposed to death. See, Hackford v. Utah Power & Light Co., 59 U.A.R. 21 (Utah 1987). However, since this is a death case, that distinction makes no difference to the application of the law.

found plaintiff Feltch 37.5% negligent and defendant 62.5% negligent. The damages awarded Mr. Feltch were reduced by the percentage of his negligence. On appeal, one issue was whether his wife's damages for loss of consortium should have been similarly reduced.

The Court, noting that under Massachusetts law the wife's claim was not derivative, held that her damages should not be reduced. The Court also declined to impute the negligence of Donald Feltch to his wife. More significantly the Court relied on language from the Massachusetts Comparative Negligence Statute that is essentially the same as Utah's in support of its position. The Court stated:

> The language of the Massachusetts Comparative Negligence Statute, G.L. c. 231, § 85 (1973), also suggests that a spouse's negligence is not to be imputed to the other spouse. The statute provides that, in determining by what amount a negligent plaintiff's damages are to be diminished, "the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought." (citation omitted). Ann Feltch was not found to be negligent, and the statute does not indicate that her recovery may be reduced by the degree of her husband's negligence. [Id. at 71, (emphasis added).]

There is no basis in logic or law for any difference from the decision in Feltch in this case. If anything, the rationale for not reducing the damages of heirs in a wrongful death case is greater than in an injury case, since the damages recovered are distinctly separate from that which could have been recovered by

the deceased, and there is no danger that the deceased will enjoy the benefit of any recovery.

b. Christie v. Maxwell

Christie v. Maxwell, 40 Wash. App. 40, 696 P.2d 1256 (Wash. App. 1985), also involved a car-motorcycle collision. There, the Court held that despite the fact that the motorcycle driver was found to be 62.5% negligent, his wife could recover the full measure of any damages awarded to her for loss of consortium.

Once again, the Court's decision turned on whether the wife's action was considered to be derivative to that of her husband. Noting that under Washington law the wife's claims were not derivative, the court stated that the claim for loss of consortium was separate and independent, and there was absolutely no danger of unjust enrichment or double recovery. It then set forth what appellant here claims is the law uniformly throughout the United States:

> A review of other jurisdictions shows a divergence of opinion on the issue of reducing consortium damages. See, 21 A.L.R.3d 469-475 (Supp. 1984), and 25 A.L.R.4th 118-144 (1983). Those that hold contributory negligence of spouse bars recovery for loss of consortium base their ruling on three different rationales - the derivative nature of the action, imputed negligence and assignee taking subject to defenses against assignor. However, those jurisdictions which recognize the independent nature of loss of consortium hold the award is not affected by the injured spouse's negligence. [Id. at 1259, emphasis added.]

See also, Mayo v. Tri-Bell Industries, Inc., 787 F.2d 1007, 1012 (5th Cir. 1986),

> In those minority comparative negligence jurisdictions that have not reduced the plaintiff's damages for loss of consortium by the percentage of negligence attributed to the negligent spouse, it has been because, unlike Texas, they do not consider the loss of consortium to be a derivative source of damages.

c. Brann v. Exeter Clinic, Inc.

Brann v. Exeter Clinic, Inc., 498 A.2d 334 (N.H. 1985), was a wrongful death action involving two claims: One for the benefit of the deceased's estate, and the other brought by the wife of the deceased for loss of consortium. The jury found defendants 49% negligent, the decedent 51% negligent, and awarded the wife $300,000 for loss of consortium. The New Hampshire Supreme Court noting that the wife's claim was not derivative, ruled that the wife's claim would not be barred or reduced by the verdict rendered against the plaintiff in the negligence action. See also, Macon v. Seaward Construction Company, 555 F.2d 1, 2 (1st Cir. 1977), applying New Hampshire law; and Goldman v. United States, 790 F.2d 181, 185 n.4 (1st. Cir. 1986), in which the Court stated:

> To be sure, the district court's denial of recovery to Goldman himself can be readily upheld under the Massachusetts law of comparative negligence. The Court could properly have found, and doubtless did find, that Goldman's negligence was 'greater than the amount of negligence attributable' to the

> defendant, and thus a bar to his own recovery. (citations omitted) But under Massachusetts law as it now stands, Goldman's contributory negligence would not bar his wife and children from recovery - assuming the United States were actually negligent here. (emphasis added.)

d. Herold v. Burlington Northern

In Herold v. Burlington Northern, Inc., 761 F.2d 1241 (8th Cir. 1985), the Eighth Circuit, applying North Dakota law, held that the District Court had erred when it reduced a wife's $2.25 million judgment by the percentage of her co-plaintiff husband's contributory negligence.

The status of North Dakota law governing the action was exactly the same as existed in Utah in this case. The court held:

> Although the court generally defers to the district court's interpretation of local law, in this case we believe the district court was incorrect. Under North Dakota law it is clear that a wife's claim for loss of consortium is an independent right, not contingent upon the rights, or liabilities of her husband. (citation omitted) Furthermore, the negligence of a driver cannot be imputed to his passenger. (citation omitted) Also, the North Dakota contributory negligence statute provides that recovery for injury shall be reduced only "in proportion to the amount of negligence attributable to the person recovering." (emphasis in original.)
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> * * * * *
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> The contrary cases cited by the defendants are from states which consider the loss of consortium claims to be derivative actions. [Id. at 1249].

e. Morgan v. Lalumiere

In Morgan v. Lalumiere, 22 Mass. App. Ct. 262, 493 N.E.2d 206 (1986), the Court held that a spouse or child is not barred from recovering from a negligent tortfeasor for his independent injury even though his spouse or parent was more at fault than the party against whom recovery is sought. There, the injured party's recovery was denied since the jury found he was 52% negligent, compared with 48% for the defendant. However, the court ruled that the full amount of the judgment awarded the husband for loss of consortium should stand, and reversed the trial court's judgment N.O.V., thereby reinstating the full amount of the jury verdict for the injured party's son.

As has been pointed out, the Utah Supreme Court has held that the heirs' claims in a wrongful death case are not derivative. In addition, the language of the Comparative Negligence Statute applicable to this case clearly indicated that only the negligence of those seeking recovery is relevant for comparative purposes. The conclusion, supported by the unanimous holding from jurisdictions with similar law, is inescapable: Darin Kelson's negligence should not have been considered by the jury for the purpose of barring or reducing appellant's claims.

f. Additional Case Law.

Other courts which have ruled that the recovery by heirs or family members for loss of consortium when another is injured or killed is not reduced by comparative negligence include: Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980), in which the Court persuasively set forth the following rationale for its decision:

> To deny a consortium claim because of the injured spouse's negligence would, in fact, create a new kind of unfairness. It would force the plaintiff, who was free from fault, to assume the full burden of damages caused by the negligence of others. It would also unjustly permit the negligent tortfeasor to escape liability altogether merely because of the fortuitous negligence of another [Id. at 679.]

See also, Olsen v. Bell Telephone Laboratories, 445 N.E.2d 609, 612 (Mass. 1983); Dunn v. Rose Way, Inc., 333 N.W.2d 830, 832-33 (Iowa 1983); Childers v. McGee, 306 N.W.2d 778 (Iowa 1981); Handeland v. Brown, 216 N.W.2d 574, 577 (Iowa 1974); Vesey v. Snohomish County, 721 P.2d 524 (Wash. App. 1986); Stapleton v. Palmore, 162 Ga. App. 525, 291 S.E.2d 445 (1982); and Lantis v. Condon, 95 Cal. App. 3d 152, 157 Cal. Rptr 22 (1979).

g. Other Authorities.

The majority of legal commentators and authorities that have considered the issue have determined that claims for loss of consortium are not derivative, and should not be reduced by the percentage of the injured party's negligence. See, e.g.,

2 Harper & James, Torts § 23.8 (1956); Prosser, Torts § 125, at 937-38 (5th Ed.); Thompson & Chacon, "Loss of Consortium and Contributory Negligence: What's the Rule?" Tex. Bar J., p. 834 (July 1985); Dickson, "Loss of Consortium; An Independent or Derivative Cause of Action?" Trial, pg. 54 (Aug. 1986).

C. Even If The Deceased Is More Than 50% Negligent, His Heirs' Claims Should Not Be Barred Under Utah Law.

In Utah, an injured party or the estate of a deceased can only recover damages if the plaintiff is found to be less than 50% negligent. U.C.A. § 78-27-37 (1973, repealed 1986). See also, § 78-27-38 (1986). In this case, the jury found appellant's decedent Darin Kelson to have been 75% at fault for his death.

However, since a wrongful death action in Utah is not derivative, and particularly given the plain language of the Comparative Negligence Statute applicable to this case, the non-negligent heirs in a wrongful death action should be able to recover the full measure of their damages if the defendant is at fault to any degree.

That has been the unanimous conclusion in "non-derivative" jurisdictions. See, Morgan v. Lalumiere, supra, deceased 51% at fault; Christie v. Maxwell, supra, injured party 62.5% at fault; Lantis v. Condon, supra, injured party 80% at fault; Goldman v. U.S., supra, 790 F.2d at 185 n. 4.

D. Any Change In The Law Must Come From The Legislature.

It has and will be argued that it is unfair to allow the heirs or relatives of a person to recover their full measure of damages, including loss of consortium, where the deceased is found to be partially or predominantly at fault for his own injuries. However, it is equally if not more unfair to deprive family members of their separate and independent damages when they were in no way at fault, and there is a third-party tortfeasor whose conduct contributed to the cause of the injury or death.

In those jurisdictions with law the same or similar to Utah, the Courts have fulfilled their duty to apply the law, though sometimes reluctantly, and held that if the law needs to be changed for any reason, it is up to the legislature to do it.

Thus, in Feltch v. General Rental, supra, the Court held:

> Ann Feltch was not found to be negligent, and the statute does not indicate that her recovery may be reduced by the degree of her husband's negligence . . . ("the statute provides only that a plaintiff's recovery is to be reduced by his or her own degree of fault, and in the instant case, the wife was not at fault.") Any change in the legislative policy as expressed in the statute is for the legislature. We are not free to fashion remedies not sanctioned by the words of the statute nor by the policies underlying the statute. [Id. 421 N.E.2d at 71 (emphasis added).]

In Morgan v. Lalumiere, supra, where the injured party was found to be 52% at fault, the Court held:

> We recognize that, carried to its extreme, such a rule may have incongruous results. A party only slightly at fault would be compelled to compensate a claimant for his full loss notwithstanding a high degree of contributory fault on the part of the claimant's spouse or parent. There is precedent in other states, however, for a rule permitting recovery by a plaintiff of the full amount of his loss even though his spouse may have been considerably more at fault than the party being sued. (Citing, Lantis v. Condon and Christie v. Maxwell.)
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> * * * * *
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> If there is a potential for an unfair result in an extreme case, the legislature may reform the rule. [Id., 493 N.E.2d at 212-13. (emphasis added).]

Perhaps the best example of a Court's adherence to its duty to apply the law occurs in Christie v. Maxwell, supra. There, the injured spouse was found to be 62.5% negligent. Nevertheless, the court held:

> While we may feel it is basically unfair to allow Mrs. Christie 100 percent recovery from Mr. Maxwell where her husband was 62.5 percent contributorily negligent, we are constrained by our interpretation of [the statute] and the rules of statutory construction from reducing her damages 62.5 percent.
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> * * * * *
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> "The Court cannot read into a statute that which it may believe the legislature has omitted, be

> it an intentional or inadvertent omission." (citation omitted). [Id., 696 P.2d at 1260.]

The same rule applies in this case. The law is clear. If it is possible for unfair results to ensue, it is up to the legislature to make the change.

The Utah Supreme Court has very recently exhibited its deference to this principle. In Hackford v. Utah Power & Light Co., 59 U.A.R. 21 (Utah 1987), the Court denied spouses the right to recover damages for loss of consortium for an injured, as opposed to a deceased spouse. The decision was based on an interpretation of the 1898 Married Women's Act, the meaning and intent of which was at least subject to question; and despite the fact that the law is virtually unanimous throughout the United States that plaintiffs may recover loss of consortium damages arising from serious injuries to their spouse. In so ruling, this Court held:

> If the cause of action argued for by the plaintiff-appellant is to be created anew in Utah, it should be done by the legislature.

Similarly, if appellant's right to recover damages for loss of consortium in this case, clearly provided by unambiguous statutory language is to be taken away or reduced, it should be done by the legislature.

It is important to note that the Utah legislature has already had one opportunity to amend the statutory language relied on by appellant on this case, but did not do so. In 1986, the

legislature abolished joint and several liability and completely revised the Comparative Negligence section of the Code. Nevertheless, the present §78-27-38 (1986), still provides:

> The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. (emphasis added.)

The heirs of Darin Kelson were not at fault at all.

II. THE TRIAL COURT ERRED IN RULING THAT THE SIBLINGS OF DARIN KELSON COULD NOT RECOVER DAMAGES UNDER UTAH'S WRONGFUL DEATH STATUTE.

Utah Code Ann. § 78-11-7 (1953), dealing with the wrongful death of an adult, provides in relevant part as follows:

> . . . only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section [78-11-6]. In every action under this and the next preceding section [78-11-6] such damages may be given as under all the circumstances of the case may be just. (emphasis added.)

The position that only the parents of Darin Kelson are eligible to recover damages for his wrongful death relies necessarily on a construction of the term "heirs" as defined in Utah's Probate Code [§§ 75-1-201 (17); 75-2-103]. This reliance is misplaced. There is only one cause of action available for all potential plaintiffs in a wrongful death action, Switzer v.

Reynolds, 606 P.2d 244, 246 (Utah 1980), and that cause of action belongs individually to those persons who suffer a loss by virtue of the wrongful death.

It is illogical to rely on a technical intestate succession definition in this context, since very rarely will a 21 year old unmarried man leave a will or an estate. A wrongful death action has nothing whatever to do with intestate succession, the source of the technical meaning of "heirs." Rather, the proceeds of a wrongful death action are separate from the deceased's estate and belong individually to the persons injured as a result of the wrongful death. Switzer v. Reynolds, supra, at 246. These persons, where the death involves an unemancipated child or adult, are the family of the deceased, including siblings.

In Chavez v. Regents of the University of New Mexico, 103 N.M. 606, 711 P.2d 883, 885-86 (1985), the New Mexico Supreme Court held that the technical definition of "personal representative" in that state's Probate Code, did not apply to wrongful death actions. Consequently, the Court found that "personal representative" in a wrongful death action could and should be interpreted more liberally than the technical meaning for probate actions. Similarly, it makes sense here to include the siblings of an unemancipated young man as "heirs" in a wrongful death action.

Appellant recognizes that there must be a line drawn at some point to define the class of persons who may claim damages in any given tort action. To that end, appellant suggests that the only logical line that can be drawn in a case involving the death of an unemancipated person is that of his immediate family. It is simply impossible to say that the parents of Darin Kelson suffered injury as a result of his death, but that the brothers and sisters he grew up with did not.

The Utah Supreme Court has stated explicitly that among the primary elements of damage in a wrongful death action are the emotional or "psychic" injuries suffered by loved ones such as Darin Kelson's brothers and sisters in this case. In Jones v. Carvell, 641 P.2d 105, 110 (Utah 1982), the court stated:

> In this jurisdiction, we recognize that the central loss resulting from the death of a child results from the destruction of those intangible, but nevertheless very real human relationships in which the blessings of love, society and companionship are both given and received with benefit to both the giver and the receiver.

It is precisely such intangible injury for which Darin Kelson's siblings seek redress in this case. To deny their claims is to ignore the express language of the Utah Supreme Court, is contrary to the statutory language that "such damages may be given as under all the circumstances of the case may be just,"

and excuses tortfeasors from compensation for readily foreseeable injuries they have inflicted.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A STIPULATION RELATING TO THE ALLEDGED BLOOD ALCOHOL CONTENT OF DARIN KELSON.

The court's attention is directed again to the facts associated with this point. Put simply, appellant's former counsel stipulated to the single most damaging piece of evidence against his client without his knowledge or consent, and in fact against his express directions. Mr. Hansen later admits that he had no authority to enter into the Stipulation, can't fathom why he may have done it, and doesn't even remember doing it. He actually stated to the undersigned: "I must have been drunk when I did it."

It is universally held that while stipulations of counsel are generally binding on the parties affected by them, relief from a stipulation may be granted by a court in the exercise of its discretion on the grounds of misrepresentation, inadvertence, improvidence, where the stipulation was ill-advised, or if to set aside the stipulation would avoid injustice rather than create it.

The law is set forth generally in 83 C.J.S., Stipulations, §§ 34-35 at pp.88-93. No case has been found dealing specifically with a stipulation regarding blood alcohol content

of a victim in a wrongful death case. However, the case law uniformly holds that the decision on whether to grant relief from a stipulation is a judgment call to be made on the particular facts and circumstances of each case. Appellant asserts that a more compelling case for relief from a stipulation would be difficult to imagine.

Certainly, the best that can be said for the Stipulation was that it was improvident and ill-advised. As to the latter, it is important to note that the Stipulation was between appellant's former "counsel," Robert Hansen, and Lou Midgley who died long before the case came to trial. No one, including appellant or trial counsel for both sides even knew about the Stipulation until it was discovered in an old file. It wasn't even filed with the court until shortly before the original trial date.

Under the circumstances, appellant respectfully contends that the trial Court abused its discretion in admitting the Stipulation.

A. Admission of the Stipulation Constituted Prejudicial Error.

Other than the Stipulation, respondents had absolutely no evidence that Darin Kelson was intoxicated on the night he died. On the other hand, appellant was able to produce testimony of witnesses who were with Darin Kelson for the entire day prior to his death, right up to minutes before the time of the collision.

Their uncontroverted testimony was that he had only one drink several hours before the collision and that he looked and acted perfectly sober at all times.

Nevertheless, in her closing argument to the jury, Deputy County Attorney Pat Marlowe relied almost exclusively on Darin Kelson's alleged intoxication in support of respondents' contributory negligence claim. Intoxication was stressed no less than 15 times in respondents' closing argument. [The full text of the closing argument is attached for the Court's reference. (See, Exhibit H)] These examples might help enlighten the Court as to the tenor of the argument:

> And Mr. Kelson undertook all those risks, engaged in all those actions upon the occasion of March 13, 1984, and now his parents want you to give them money because of their son's suicide. That's exactly what it is. This individual voluntarily consumed alcohol, he voluntarily intoxicated himself. [Exhibit H at pp. 4-5.]
>
> * * * * *
>
> You have heard the intoxication evidence. You know that his vision was (sic) impaired, and you know that his reasoning was impaired, and you know that his hearing was impaired. You know that his manual dexterity was impaired. You know that this man was operating a motorcycle when he was drunk. And yet you are supposed to believe that he couldn't have prevented the accident. [Exhibit H at 11.]

It cannot be questioned that evidence of alleged alcohol consumption and intoxication in a case involving a collision

between a speeding motorcycle and a police car is prejudicial in the extreme.[6] It is also clear that respondents would not have been unduly prejudiced if the court had granted appellant relief from the Stipulation. All that would have been required was for appellant to put on a proper case relating to alcohol consumption, its effect, and the reliability of the blood test procedures used.

Appellant always has and continues to dispute the allegation that Darin had been drinking and was intoxicated. However, because of the improvident, ill-advised, unwarranted and unauthorized Stipulation that was admitted into evidence, appellant's case was dealt a crushing blow.

Appellant contends that the admission of the Stipulation under the circumstances was an abuse of discretion resulting in prejudicial error. Appellant respectfully requests that, upon remand, that the Stipulation be held to be inadmissible.

---

[6] Consequently, an alternative basis for appellant's position is Rule 403, Utah Rules of Evidence, which provides that evidence should be excluded if its probative value is outweighed by its tendency to confuse the jury, or if it is unduly prejudicial.

In this case, while the purported Stipulation had literally no probative value, it was prejudicial in the extreme. Further, counsel for respondent was allowed to rely almost exclusively on the non-evidence of intoxication to inflame the jury. In short, by allowing the Stipulation to come in, the trial Court gave respondents a wild card to play that was not earned or justifiable by any notion of fairness, and which was impossible for appellant to counter.

CONCLUSION

Utah law clearly and expressly provides that any negligence of the deceased should not be compared with that of a tortfeasor for the purposes of determining liability and damages in a wrongful death case. The trial Court's instructions to the jury to the contrary constituted reversible error.

The Court also erroneously excluded the siblings of Darin Kelson from the class of persons entitled to damages for his wrongful death. In the case of a minor or adult, with no wife or children, the only logical class for recovery under Utah's Wrongful Death statute is the victim's immediate family.

Finally, the trial Court committed prejudicial reversible error when it refused to grant appellant relief from a ridiculous and expressly unauthorized Stipulation executed by two attorneys who had nothing to do with the trial. The Stipulation, involving the alleged blood alcohol level of Darin Kelson at the time of his death, was the single most damaging piece of "evidence" used by respondents at trial. Although it was contrary to the direct testimony in the case, it was relied on quite heavily by respondents' counsel in arguing the alleged fault of appellant's decedent.

WHEREFORE, appellant respectfully requests that the judgment below be reversed and remanded for a determination of damages only. If remanded for re-trial, appellant requests that it be

with instructions to include the siblings of Darin Kelson as persons eligible to recover damages; and that the blood alcohol Stipulation be inadmissible.

DATED this 6th day of August, 1987.

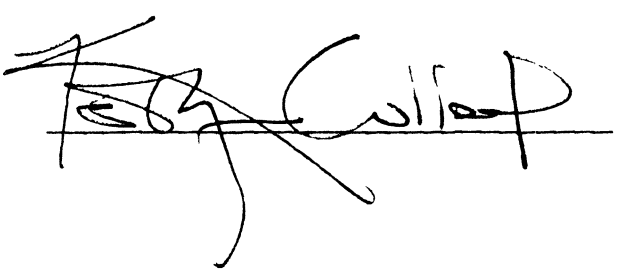
COLLARD & RUSSELL

KATHRYN COLLARD

STEVE RUSSELL

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 1987, I mailed (4) copies of Appellant's Brief On Appeal to all counsel of record for respondents at their address as shown below, by depositing the same in the U.S. Mail, postage prepaid.



DAVID E. YOCUM
Salt Lake County Attorney
PATRICIA J. MARLOWE
THOMAS L. CHRISTENSEN
2001 South State #3400
Salt Lake City, Utah 84190-1200

Exhibit A

INSTRUCTION NO. 32

This case will be submitted to you on the basis of comparative negligence.

If you find that the death of Darin Kelson was proximately caused by a combination of the negligence of the defendant Perry Buckner and the negligence of Darin Kelson, then you must determine the percentage of negligence you assign to defendant Perry Buckner and the percentage of negligence you assign to Darin Kelson in causing the death of Darin Kelson.

In assigning percentages of negligence, you should keep in mind that the percentage of negligence to a party is not to be measured solely by the number of particulars in which a party is found to have been negligent.

You should weigh the respective contributions, if any, of each person to the death in question and considering the conduct of each as a whole, determine whether one made a larger contribution than the other, and if so, to what extent it exceeds that of the other.

Instruction No. 33

In comparing the negligence of the respective parties, if you find that the negligence attributable to Darin Kelson is 0 to 49%, and the negligence of defendant Buckner is greater than 50%, then the Kelsons will recover damages against the defendants.

However, if the percentage of negligence you assign to Darin Kelson is equal to or greater than the percentage of negligence assigned to defendant Buckner, then the parents of Darin Kelson will recover nothing on their claims.

Any percentage of negligence which you assign to Darin Kelson will be used by the Court to reduce any damages that you award to his parents. In determining the amount of damages to the Kelsons as a result of their son's death, you should not make any reduction based on any percentage of negligence you attribute to Darin Kelson. Any reduction that is necessary will be made by the Court. The Court will know what to do with your figures.

Exhibit B

"Exhibit"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DARRELL KELSON, personal representative of the estate of DARIN KELSON, deceased,	:	SPECIAL VERDICT
	:	CIVIL NO. C-84-5659
Plaintiff,	:	
vs.	:	
SALT LAKE COUNTY, a political subdivision, and PERRY BUCKNER in a representative capacity only,	:	
	:	
Defendants.	:	

We, the jury in the above-entitled action, for our Special Verdict, answer the questions submitted as follows:

Question No. 1: Was defendant Perry Buckner negligent?

Answer: Yes ✓ No_____

If your answer to question No. 1 was "no," do not answer any further questions on the Special Verdict.

Question No. 2: If your answer to question No. 1 was "yes," was such negligence on the part of Perry Buckner a proximate cause of Darin Kelson's death?

Answer: Yes ✓ No_____

If your answer to question No. 2 was "no," do not answer any further questions on this Special Verdict.

If your answer to question No. 2 is "yes," go on to the next page.

EXHIBIT B

Question No. 3: Was the decedent Darin Kelson negligent in operating his motorcycle?

Answer: Yes ✓ No_____

If your answer to question No. 3 was "no," do not answer question No. 4 in this Special Verdict.

Question No. 4: If your answer to question No. 3 was "yes," was such negligence on the part of decedent Darin Kelson a proximate cause of his death?

Answer: Yes ✓ No_____

If your answer to either question No. 3 or No. 4 was "no," do not answer question No. 5.

Question No. 5: Taking the combined negligence which caused decedent Darin Kelson's death at 100%, what percentage of such negligence do you attribute to:

(a) Perry Buckner 25 %

(b) Darin Kelson 75 %

TOTAL 100 %

If your answer to either question No. 1 or No. 2 was "no," do not answer question No. 6.

Question No. 6: What sum of money will fairly and reasonably compensate plaintiffs for the loss of decedent Darin Kelson?

$_____

DATED this 29 day of January, 1987.

Dale Martin

FOREPERSON

Exhibit C

ROBERT B. HANSEN
ATTORNEY AT LAW
965 EAST 4800 SOUTH SUITE 3H
SALT LAKE CITY, UTAH 84117
801 262 8634

July 26, 1985

Darrell Kelson
3220 South 7945 West
Magna, Utah 84044

Re: Wrongful death

Dear Darrell:

Yesterday I received 15 pages of photo copies of notes I assume you made after talking to various persons.

The thrust of these statements seem to be that you want to take issues with the fact that your son was not drinking as much as the tests for blood alcohol indicate, not driving his motorcycle as fast as the police claim.

As you know it was my opinion that we'd have to accept those facts and win in spite of them. With Val Shuppe's testimony I think we can do that. However, since you seem determined to try the case by fighting those facts it would seem best for you to find other counsel who agrees with that approach and pay me and Mr. DeBry for what we've done to this point.

Please consider this and let me know soon.

Yours truly,

Robert B. Hansen

RBH:hk
Cc: C. Richard Hendricksen
Rulon Burton & Associates

Exhibit D

KATHRYN COLLARD, #0697
J. STEPHEN RUSSELL, #2831
Attorneys for Plaintiff
401 Boston Building
Nine Exchange Place
Salt Lake City, Utah 84111

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

DARRELL KELSON, personal representative of the Estate of Darin Kelson, Plaintiff, v. SALT LAKE COUNTY, a political subdivision of the State of Utah; and PERRY BUCKNER, in a representative capacity only, Defendants.	*	AFFIDAVIT OF ROBERT B. HANSEN IN SUPPOPRT OF PLAINTIFF'S SECOND MOTION IN LIMINE Civil No. C-84-5659 Judge Michael R. Murphy

SALT LAKE COUNTY)
:ss.
STATE OF UTAH)

ROBERT B. HANSEN, being first duly sworn upon his oath, deposes and states:

1. I was formerly counsel for the plaintiff in the above referenced action.

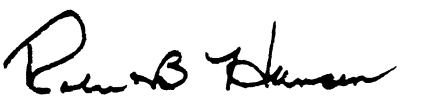
2. During the entire time I represented the plaintiff, I was aware that the plaintiff vigorously contested that his son was intoxicated at the time of the collision involved in this

case and that he believed there were irregularities in the manner in which the blood sample was taken from his deceased son, Darin Dee Kelson, after the collision.

3. At no time did the plaintiff authorize me to enter into any stipulations with the defendants in this case with respect to the results of a blood alcohol test alleged to have been performed on plaintiff's decedent, Darin Dee Kelson, following the collision.

4. In fact, I have no recollection of ever entering into any stipulation with the defendants' former counsel, L.E. Midgley, now deceased, regarding such matter.

DATED this 24th day of October, 1986.



ROBERT B. HANSEN

VERIFICATION

On October 24, 1986, personally appeared before me Robert B. Hansen, who, being first duly sworn upon his oath, deposed and stated to me that he had read the foregoing document and that he knows and understands the contents thereof and that the same are true, to the best of his knowledge, information and belief and that he signed the foregoing document in my presence.

DATED this 24th day of October, 1986.

Ellen J. Sirola
NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:
April 8 1990

DELIVERY CERTIFICATE

I hereby certify that on this 24th day of October, 1986, I had a true and correct copy of the foregoing Affidavit hand delivered Ms. Patricia Marlowe, Attorney for Defendants, Salt Lake County Attorney's Office, 241 East 400 South, Salt Lake City, Utah, 84111.

Ellen J. Sirola

Exhibit E

KATHRYN COLLARD, #0697
J. STEPHEN RUSSELL, #2831
Attorneys for Plaintiff
401 Boston Building
Nine Exchange Place
Salt Lake City, Utah 84111

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

DARRELL KELSON, personal representative of the Estate of Darin Kelson, Plaintiff,	*	AFFIDAVIT OF DARRELL KELSON IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE
v.	*	Civil No. C-84-5659 Judge Michael R. Murphy
SALT LAKE COUNTY, a political subdivision of the State of Utah; and PERRY BUCKNER, in a representative capacity only, Defendants.	*	

SALT LAKE COUNTY)
:ss.
STATE OF UTAH)

DARRELL KELSON, being first duly sworn upon his oath, deposes and states:

1. I am the plaintiff in the above entitled action.

2. I make this Affidavit based upon personal knowledge.

3. In September, 1986, my counsel, Kathryn Collard, informed me of the existence of a Stipulation purportedly executed on my behalf by my former attorney, Robert Hansen,

EXHIBIT 2

relating to the authenticity of a document purporting to be a toxicology report on the blood alcohol content of the body of my deceased son, Darin Kelson, at the time of his death.

4. Prior to the time Ms. Collard informed me of the existence of the Stipulation, I had no knowledge concerning the Stipulation and had never discussed it with Mr. Hansen and had never authorized him to agree or execute the said Stipulation in my behalf.

5. Because of my personal belief that there were irregularities in the manner in which the blood sample was taken from my son, and because I believe such evidence is irrelevant to any issue in the above entitled action and that its introduction at trial would be prejudicial to my case, I would not have authorized Mr. Hansen to execute the Stipulation, and request that this Court permit the Stipulation to be withdrawn.

DATED this 21st day of October, 1986.

Darrell Kelson

DARRELL KELSON
Affiant

SUBSCRIBED TO AND SWORN BEFORE ME this 21st day of October, 1986.

Ellen J. Sirola

NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:

April 8, 1990

Exhibit F

3225 So. 1945 W.
MAGNA, UTAH
April 25, 1985

Robert HANSEN
4700 So. 900 E.
SALT LAKE CITY, UTAH

Dear Sir,

Because of un---- cond-
tions, please be advised not to
make any agreements or settle-
ments with the Salt Lake County
Attorneys office, or any body else
in authority, without my sole
written permission.

If any has been made
please revoke immediately.

cpy. to
Rulon T Burton
& associates.

Yours truly,
Darrell L. Nelson,

EXHIBIT 1

Exhibit G

ROBERT B. HANSEN
ATTORNEY AT LAW
4700 SOUTH 900 EAST #C
SALT LAKE CITY, UTAH 84117
801 262 8634

August 26, 1985

Darrell Kelson
3220 South 7945 West
Magna, Utah 84044

Dear Darrell:

Under seperate cover I am sending you papers from your file that may be of use to successor counsel.

I understand you have picked up your file from Mr. Hendricksen.

I estimate I have spent over three hours on your case so you owe me $300 out of any settlement or verdict you obtain. Please confirm that debt.

Yours truly,

Robert B. Hansen

RBH:hk
Cc: C. Richard Hendricksen
350 South 500 East
Salt Lake City, Utah 84102

Material mailed under S.C.

Exhibit H

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DARRELL KELSON, Personal Representative of the Estate of Darin Kelson,	:	
Plaintiffs,	:	C84-5659
vs.	:	
SALT LAKE COUNTY, a political subdivision of the State of Utah; and PERRY BUCKNER, in a representative capacity only,	:	REPORTER'S PARTIAL TRANSCRIPT
Defendants.	:	

BE IT REMEMBERED that on the 28th day of January, 1987, the above-entitled action came on regularly for hearing before the Honorable Michael R. Murphy, Judge in the Third Judicial District for the State of Utah, and was reported by me, Gayle B. Campbell, a Registered Professional Reporter and Notary Public in and for the State of Utah.

A P P E A R A N C E S:

For the Plaintiff: Kathryn Collard and J. Stephen Russell
Attorneys at Law
401 Boston Building
Salt Lake City, Utah

For the Defendants: Patricia J. Marlowe and Thomas L. Christensen
Deputy County Attorneys
231 East 400 South
Salt Lake City, Utah

GAYLE B. CAMPBELL
CERTIFIED SHORTHAND REPORTER
SALT LAKE CITY, UTAH

Salt Lake City, Utah January 28, 1987

P R O C E E D I N G S

(Excerpt of proceedings containing closing argument of Patricia Marlowe representing the State of Utah.)

THE COURT: Are you ready to proceed, Ms. Marlowe.

MS. Marlowe: I am, Your Honor.

THE COURT: Go ahead.

MS. MARLOWE: May it please the Court, counsel, members of the jury: You will be happy to know that it's almost your turn, that the lawyers' turns are almost over, and that you do not have to listen to either of us anymore. You have to listen to me and Ms. Collard again, then it's up to you. You get to retire and deliberate, and you're going to decide what the facts and circumstances were as they occurred on March 13, 1984, at the time of this collision between Perry Buckner's patrol car and Darrell Kelson's motorcycle.

I want to remind you that the hard part for you lies just ahead, that it's not easy to be jurors, and I would ask you to recall the oath that you took. You agreed that you were going to decide this case based upon the facts and based upon the law as the Court has instructed you on. And that oath is sacred and you have to follow that oath and you are bound by the facts and you are also bound by the law.

You also agreed that you would not decide this case based upon sympathy, and you have been instructed

that you will not decide this case based on sympathy. So the fact that an individual died, and unfortunately died, is not a basis for making your decision in this case. Specifically, you cannot find that the defendant Buckner was negligent solely based upon the fact that Darin Kelson was killed on March 13, 1984. Rather, you have been instructed by the Court that you must find that there was a breach of some duty, or some negligence which proximately caused the death of Darin Kelson. And further, you have been instructed that you would then have to make some determination of damage. But you have to consider those instructions which the Court has given you, which you will take with you to the jury room, in arriving at your decision in this case.

Let's examine what you have seen and heard over these many days and talk about some of the exhibits and what bearing they have on your consideration of this case. You all know now that Darin Kelson was a young man, that according to the defendant's version of the facts Darin Kelson consumed at least five drinks sometime on March 13, 1984, and that he left his house on his motorcycle and was on his way to work. That he deliberately turned in front of a peace officer, Officer Wilden, that he accelerated rapidly and deliberately drew the peace officer's attention, or the officer's attention such that he caused Officer Wilden to attempt to make a stop for speeding.

And Officer Wilden activated his light and siren, and Mr. Kelson did not stop. Mr. Kelson at that minute

in time could have prevented this whole incident just by reason of stopping for the speeding violation. But oh, no, probably involved by the alcohol, feeling euphoric, he proceeded to engage in a high speed dangerous chase with Officer Wilden, which ultimately culminated in his death.

And during that chase Mr. Kelson again had an opportunity to stop, and Mr. Kelson did not stop. Mr. Kelson saw the police officers upon two occasions, at the time he turned in front of the police prior to the time this chase ever really began, and saw him again throughout the chase clearly. Mr. Kelson was aware that there was a peace officer following him, that there was a siren going, that there were lights going, but instead he led the officer through the subdivision, violating all speed laws, and continued from this to flee from this police officer in violation of Utah state law.

And then when Mr. Kelson pulled on to 5400 South, or 5415 South, which later becomes 5400 South, he was on a straight away. He had a straight shot, and arguably he opened up his speed. He was on this high production bike that he thought and he knew and he was confident, probably by reason of his intoxication, that he could outrun this peace officer, and he proceeded to try and do so.

And Mr. Kelson undertook all those risks, engaged in all those actions upon the occasion of March 13, 1984, and now his parents want you to give them money because

of their sons suicide. That's exactly what it is. This individual voluntarily consumed alcohol, he voluntarily intoxicated himself.

You have heard from the Court that a blood level in excess of .08 is unlawful. It is unlawful with that blood level to operate a motor vehicle in the State of Utah. Mr. Kelson's blood alcohol level was in excess of that amount. He was at .11 percent blood alcohol, and yet he operated this motorcycle. You all realize what we're talking about is a high powered motorcycle, and we're talking about an instrumentality that probably a lot of you would say was dangerous, and I believe Mrs. Kelson didn't like that motorcycle. She implied that it was not safe, her son engaging in the operation of a motorcycle at high speeds in violation of traffic laws and while he's intoxicated. And for that conduct these plaintiffs want you to award them damages.

I can also indicate to you that Mr. Kelson, while fleeing from the officers, failed to keep to the right, that he could have avoided this traffic accident or this accident if he was driving to the right. This collision occurred in a left turn lane, more towards the center of the intersection.

If Mr. Kelson had been watching where he was going, if Mr. Kelson had been driving 45 miles an hour or had been driving at even a lesser speed, he would not have hit that officer's patrol car, Perry Buckner's patrol car in that intersection.

Yet plaintiffs have twisted this case and turned it upon its head and they are saying, well, but for the fact that Buckner was in the intersection, this death would never have occurred. This death would never have occurred but for the fact that Darin Kelson was intoxicated on March 13, 1984, he voluntarily became intoxicated, he got on a motorcycle, he ran from police officers, deliberately engaging their pursuit.

He must have felt euphoric in that he continued to drive in violation of all traffic laws or all traffic laws as you have been so instructed, and he failed to keep a proper lookout.

You have testimony that when the chase turned on to 5415 South that it was elevated and the road was raised. And so you have Officer Wilden at one point seeing the officers clearly at this intersection because all of these patrol cars were in elevated areas.

And so the only person who might somehow -- or the person that can see best in this particular case would be this Darin Kelson. You have him at this high point looking across the people and could have seen Officer Buckner's patrol car as well as the other patrol cars, assuming that the road continues down, and there is some evidence to indicate the directions. He was clearly in a better position to see the two patrol cars who had these huge overhead lights than these patrol cars were able to see this single little light on the motorcyclist that arguably was lost in the depression.

Plaintiffs make a big deal about there were all these officers and they saw the motorcyclist but Buckner didn't. They somehow suggest to you that he deliberately pulled out into the path of the motorcycle. And if he didn't do it deliberately, then he did it negligently or carelessly because he should have known that that motorcycle was right up, coming right at him.

What he didn't tell you -- what plaintiffs failed to tell you is that Mr. Kelson was in the best position to see anything in this case, but that he failed to look. He is the person who failed to keep a proper lookout. Instead, he engages in this reckless conduct and he drives this motorcycle in a reckless and dangerous fashion.

How is a reasonable peace officer supposed to detect a single headlight moving toward him at excessive speed? Why should that light not get lost in all of the backlight around the area? How do you know that single spotlight was not lost in the depression in the road at the time that Perry Buckner was looking eastbound and looking for this motorcyclist?

Of course, as I say, plaintiffs have turned this case around on its head, and that everything that happened was because of Perry Buckner. They want to start at the end of the collision and the death of Darin Kelson, and they want to blame everything that happened prior to that time on Perry Buckner.

If Mr. Kelson had not speeded, he could not have collided with Perry Buckner. If Mr. Kelson had not

fled from peace officers, there wouldn't have been any chase. And Perry Buckner would have had no reason to be assisting in some fashion in watching the progress of this chase.

But oh, no, argued the plaintiffs. Everything that happened in this case happened because of the negligence of Perry Buckner. I would submit to you that there was no negligence on the part of Perry Buckner, and the fact that Mr. Buckner was unable to see a motorcyclist traveling at him at a high rate of speed was in fact the reason he pulled out in the path of this motorcyclist, which was an innocent mistake. It was not deliberate and intentional, and it was not unlawful. We have had lots of discussions about what the law requires. Clearly all police vehicles or emergency vehicles pursuant to State law are required to sound sirens or make some other audible noise as reasonably necessary. And further, that emergency vehicles are required to be equipped with lights.

However, State law also says that police vehicles do not have to display lights, do not have to be equipped with or display lights. So then the status of a police vehicle is that, at most, in order to drive in violation of any traffic laws or of any laws, all a police vehicle has to do, when engaged in an emergency, is sound a siren, if reasonably necessary.

Ladies and gentlemen, what would a siren have done in this case, assuming that the intersection light was red? What good would this siren have done? How would

it have alerted Mr. Kelson to the danger ahead at the intersection? He had already heard -- here is Mr. Kelson barreling along, arguably at speeds in excess of 76 miles an hour, and that bike was capable of 140 miles an hour.

So you have this individual on a highway driving a high powered motorcycle which can be very noisy. You know from the testimony which was elicited by the plaintiff that this individual was wearing a full shield, a full helmet shield. But they want you to believe that but for the failure to activate a siren at this intersection, that that accident would never have occurred.

Mr. Kelson had two police vehicles chasing him, two police vehicles displaying lights, two police vehicles running sirens, but somehow this third siren at some location in front of Mr. Kelson was going to alert him to the danger at the intersection.

Mr. Kelson, you know, because he was intoxicated, because he was fleeing from officers, he was still required to operate as a reasonable and prudent driver. He still has an obligation under the Utah laws to not enter intersections at excessive speeds. He was required to keep a proper lookout.

I submit that he violated all of those laws in the course of his fleeing from these peace officers. That the only reason that his death occurred was because of his carelessness, because he was negligent, and because he was intoxicated.

Perry Buckner just happened to be the individual

that was in the intersection upon the happening of this collision. It could have been someone else. I mean, let's say that the light was green and Mr. Stromberg pulled out. And so you have Mr. Kelson driving up the road at a high rate of speed, and for some reason he turns over and he hits Mr. Stromberg. Well, Mr. Stromberg would be here in front of you.

How do you know that some other individual might not have entered that intersection, other than defendant Buckner? You don't know. You don't know what risks there were. Those types of risks Mr. Kelson was chargeable with at the time he engaged in this unlawful activity. That he should have known and he should have appreciated that there could have been risks, as he fled from these police officers, and that he should have known that speeding -- you know, it brings about problems, and speeding can cause accidents.

He clearly should have known that speeding combined with intoxication can be fatal, and in fact was fatal. He should have known that someone could have been in the intersection. He had no reason to rely upon the fact that the light was red or green. There is a lot of controversy over the color of the light, but here Mr. Kelson is, and do you believe he was looking ahead, saying, oh, the light is green. I can go through the light and no one is going to run into me?

He wasn't thinking, ladies and gentlemen. The only thing he was concentrating on was managing that

motorcycle at a high rate of speed. You have heard the intoxication evidence. You know that his vision wasn't impaired, and you know that his reasoning was impaired. You know that his hearing was impaired. You know that his manual dexterity was impaired. You know this man was operating a motorcycle when he was drunk. And yet you are supposed to believe that he couldn't have prevented this accident.

It was his very course of conduct that resulted in this collision. That he is the person that undertook all those risks, that he is the person who put himself in that place and caused this chain of events. But for his actions on the night of March 13, 1984, nothing would have happened. The fact that Mr. Buckner may have been in the intersection is not the cause of the collision. The cause of the collision was the intoxication and irresponsibility and negligent conduct of the deceased, which resulted in this collision, which resulted in his death.

Counsel has made a point about the color of the light, but let me just say that, since this is my only opportunity, that the only person that gave any evidence at the time of the collision relative to the color of the light was Andrew Burton. And I invite you to examine plaintiffs' Exhibit 19P -- excuse me -- that was Mr. Stromberg. There is an exhibit, and I won't bother to look for it, but look at Andrew Burton's statement. It was taken contemporaneously or shortly after this accident. I would submit that's the best evidence of what occurred. In that statement he says that the light was in favor of Buckner.

Counsel suggests to you that, oh, gee, Mr. Toone had all this wonderful information, and of course he went to see John T. Nielsen, and he told him what a jerk this cop was and what charges ought to be issued against Deputy Buckner.

John T. Nielsen just couldn't issue charges against one of the Salt Lake County Sheriff's Deputies. There was no evidence to support those claims, and there's no evidence to show that Mr. Nielsen conducted himself in less than a professional and responsible manner. He is the chief criminal deputy for Salt Lake County.

And in any event, this so-called wonderful note, there is nothing contained within the notes that Officer Toone gathered and gave to Mr. Nielsen that at any time indicated that Mr. Greer knew what color the light in the intersection was. Read the notes, read the exhibits. That is missing from any documents that were ever presented, and I just want to flash plaintiffs' Exhibit 7P, and I want to show you the work product of this professional peace officer, Officer Toone. This is Officer Toone's idea of professionalism in reporting. But he's just professional, and that's one of his notes, and maybe you ought to look at plaintiffs' Exhibit 8P, Mr. Toone's notes again.

He doesn't do any comprehensive reporting here. He doesn't put anything down that relates, but he comes in and tells you that Mr. Greer said, "Yes, the light was red."

There is no such such statement in the note relative to Mr. Greer's statement. Tropper Toone has misrepresented to you the testimony of the witnesses, that as he knew it at the time of the investigation, at the time he approached Mr. Nielsen for criminal charges. In fact, there is no evidence to suggest that Tropper Toone at any time tried to convince Mr. Nielsen there ought to be criminal charges. The only evidence before you is that Toone made a somewhat sloppy investigation of this matter, that he clearly developed some bias relative to defendant Buckner, that he did kind of a half-baked investigation.

I mean, there is nothing stylish about his reports, and there is nothing thorough about his investigation. They hired him. He hired himself out so that he could be paid. So he investigates this as a highway patrol officer. He claims he's impartial, and yet he's been around this courtroom. You have seen him. He has sat in since he testified and was excused as a witness, listening to what was going on.

Now, are those the actions of an unbiased and impartial person? I mean, what motivated Tropper Toone to come here and try and blame this accident on Perry Buckner. You tell me that any of the conclusions that he testified to are reasonable conclusions, conclusions that a responsible accident reconstructionist or experienced and responsible accident investigator would have arrived at.

Where does he get this 70-30 comparison of negligence? He wants you to believe that Buckner, by reason of an innocent mistake, in that he did not see the motorcycle, he believed because of this dispatch communication that the motorcyclist was two blocks away from him, and he claims -- he says the light changed green, he saw Mr. Stromberg, and he says that Buckner's actions in pulling into that intersection were negligent. He says that it was improper lookout. He tells you that he broke a red light. Mr. Toone wasn't at that accident. He doesn't know what went on. He just comes to court and tells you what's possible. He says he read so and so's statement, and he believes that to be the facts. He doesn't go out and time those lights, he didn't do anything. All he did was come to court and give you conjecture and say that this is who I blame and you ought to believe me because I'm such a great expert. He tells you that Mr. Stromberg says the light was red. That is a lie, ladies and gentlemen. Read the written statement that was given to the Sheriff's office at the time of the accident. Mr. Stromberg made no such statement.

You saw Mr. Stromberg in court. Did he tell you the light was red at the time of the collision? No. Mr. Stromberg said he didn't know. But anyway, Toone keeps saying that gee, this occurred because I had all this unimpeachable evidence, and the light was red and Buckner is negligent.

There was no such evidence to support those

conclusions. All he's done is torture the facts, whatever facts, and he twisted the testimony and manufactured this case. In fact, this case is based solely upon the testimony of Toone.

I mean that every allegation, every assertion made by plaintiffs is based upon Trooper Toone, and Trooper Toone said this and Trooper Toone said that.

Finally, ladies and gentlemen, you are supposed to decide this evidence based upon the facts, exhibits, and you are supposed to decide based upon what you have seen here today. I submit that you ought not to listen and you ought to discredit any of the testimony put forth by Trooper Toone, that he is not impartial, that he is biased, and that he's been paid in this case and he became a paid expert and he is not objective.

If he were so concerned about the failure to file criminal charges in this matter, why didn't he appeal it to a higher level? Whatever evidence is there that he did anything? He comes into court and he claims, well, he told John T. this and he told John T. that, and he suggests that -- he doesn't outright, you know, testify that John T. just didn't listen to anything he had to say.

There is no evidence of that, ladies and gentlemen. All he has done is try and take advantage. Mr. Nielsen comes to court and tells us that as part of his duties he reviewed the facts and circumstances and that he found there's no criminal negligence. And that to the best

of his recollection there are no problems with this case. Is it because Mr. Toone isn't mentioned in John Nielsen's letter to Sheriff Hayward, wherein Mr. Nielsen sets forth his opinions and findings? Is it because Mr. Toone isn't mentioned in that letter that Mr. Toone is upset? Is he upset because Mr. Nielsen didn't say that because of the marvelous work of Officer Toone, that I reached my conclusions?

What happened in this case, ladies and gentlemen? That's for you to decide. This matter comes to the office, it goes out, there are no waves, then suddenly here's Mr. Toone. Of course, you see, Mr. Toone didn't think there was any 70-30 comparative negligence until after he was retained and paid by plaintiffs' counsel. But he continues to tell you that he's not biased. Of course today we came to court and he was recalled in rebuttal, and as you will recall, Mr. Christensen asked him, you know, why he continued to be around the courtroom and why he was here, and he said it was because he was an interested party.

This witness is confusing himself with the parties. He doesn't know about he's not a party to this lawsuit. The only parties are the plaintiffs and the defendants. He is just a witness, and now somehow he's become a party?

If I could just go through quickly, I hope, you have heard all the evidence and I'm sure you're tired of all the evidence, but you will recall Kevin Judd. He was in the car with Perry Buckner, and the only thing

that is salient relative to his testimony is the fact that he saw the motorcycle just shortly before the collision.

Of course plaintiffs will say to you that because Kevin Judd saw that motorcycle coming, just like that, that Mr. Buckner should have seen it too. That's irrelevant in this case, ladies and gentlemen. You are not to judge Perry Buckner on the basis of what Kevin Judd saw or did. They are not in the same place. You don't know if what Kevin Judd saw was what Perry Buckner should have seen. The whole issue here is that he didn't see it. There is no evidence that shows Perry Buckner did see that motorcycle.

Plaintiffs say that if he didn't see it, he should have seen it. But we can't prove that he should have seen it. And the evidence, if anything, is that the motorcycle came fast and from out of nowhere, that when Buckner looked -- and that is the key -- when Buckner looked, he saw no motorcycle. Plus, he believed that the motorcycle was at least two blocks away from the intersection.

There's been testimony saying that to let you know that these officers are not telling each other about the location of this chase or what was going down. They are not talking on the radio because they could have been interrupting transmissions being made by Wilden. They would have tied up the radio. So if you're sitting there thinking that, well, gee, maybe, you know, Judd was sitting in the same car so maybe he should have told Buckner,

though Buckner would have been distracted from listening to the dispatch. You know, this whole incident occurred within two and a half minutes. You heard the tape, and the collision occurred long before the end of that tape. So you have a chase, a high speed chase, and it goes fast, and then this individual is dead.

This isn't something that happened over a protracted period of time. If you read the written transcription of the tape it will suggest to you some time length. Ladies and gentlemen, you heard the trial, and you heard the copy of the dispatch time. You know this happened really quickly. So you have officers that are trying to assist the situation, they are listening, and they are figuring out, and Perry Buckner is sitting at that intersection relying upon what was being broadcast, and from the dispatcher he hears that this motorcyclist is two blocks away. And based upon that and the fact that he saw the light had changed to green, he crossed the intersection and Mr. Kelson ran into the patrol vehicle.

Mr. Stromberg. I have already indicated to you that Mr. Stromberg came to court and he never testified as to the color of the light because he doesn't know. In his witness statement he enver offered an opinion as to the color of the light. He's been interviewed by lots of people, and he's never been sure. You saw him, and you say, was the light red? "Yes." Was the light Green? And he just goes back and forth. He doesn't know. And he's not real positive. You saw him. You make that

decision.

What is interesting about Mr. Stromberg, he claims this intersection was very dark. So of course he can't see these two police cars across from him until they turn on their overhead lights. We have Mr. Greer, who passed the intersection, and Mr. Greer wants you to believe that he observed these events in his rear view mirror, this collision. Even though Mr. Stromberg says that this intersection was very dark.

The plaintiffs can't have it both ways. If the intersection is dark and Mr. Stromberg couldn't see across the street, then how could Mr. Greer say from up the street what was happening in this intersection? Oh, Mr. Stromberg, you ought to look at the documents that have been introduced by plaintiffs. Look at that statement, and there is no mention as to the color of the light.

Jeff Greer, the thing that strikes me most about his testimony is that why did he think the cops grabbed Kelson? Was it because his friend had a habit of engaging in high speed chases with police officers? When did he assume that these cops were along the way waiting for Darrell Kelson? And I ask you, I repeat to you again, that Toone's notes show no indication of what color the light was, according to Mr. Greer.

So at the time that Greer or Toone completed his accident investigation he hadn't elicited any such testimony from Mr. Greer. So you have Mr. Greer who's come in here and given testimony, and he's done it on

behalf of the plaintiffs. But he's biased in this case, that he's friendly with the plaintiffs and the family and he would like to see them recover some money. Further, that he was friendly with the deceased. So he's come and he's manufactured his testimony for the sole purpose of trying to convince you that you ought to award some money to this family.

Talking about damages, of course, isn't our favorite subject, and I just want to point out to you that we're not talking about an individual who was an astronaut or one of the Kennedys, we're talking about a young individual who had no substantial schooling, had a job, you know, for a short period of time at Hercules. Of course they will claim that he was going to work there forever. We would submit that if you made it a habit of going to work drunk, you probably could not retain your employment for very long. But that's what we're talking about, ladies and gentlemen. We're talking about the worth of individuals. And of course you know all individual lives have worth. That's not the point. The point is that if you should feel that damages are necessary, that the damages have to be reasonable, and you can't just award damages because you feel sorry for someone, that you have to do it reasonably.

There's been a discussion also about percentage of negligence. Of course Deputy Probert said that he felt that Mr. kelson was 100% negligent. And I would concur with that opinion. Look at the evidence. I mean,

all you have isMr. Buckner who unfortunately pulls out in front of this high speed motorcycle, and they want you to find that he is, you know -- he's more responsible for pulling out in the intersection than Mr. Kelson was responsible for anything that happened up to that point in time.

Of course you also want to give a message, I guess, to -- the plaintiffs would also give the message in this type case, and they want you to tell people that they can flee from officers, they can engage in outrageous activities, that they can drive at high speeds, they can drive while intoxicated, they can run into police vehicles and they can die, then they can further through their lawyers recover from their own wrongful death. And that's not the message this jury should send. This jury ought to send the message that Darin Kelson was solely responsible for his own death. That Darin Kelson caused his own death, and that Mr. and Mrs. Kelson, while it's too bad, the fact that their son died, was caused by their son's own misconduct on March 13, 1984.

And so, ladies and gentlemen, based upon the evidence that I know you have heard, that I know you are going to consider, you're going to look at the exhibits and recall the testimony that came out through the defendants' witnesses, by Perry Buckner, and we ask you to find no cause of action.

We ask you to find that there was no negligence on behalf of Perry Buckner on March 13, 1984. We ask

you to find that the death of D a r i n Kelson was caused solely by the negligent actions of D a r i n Kelson. Thank you for your attention.

(Further proceedings reported but not included in this partial transcript.)

REPORTER'S CERTIFICATE

State of Utah)
: ss.
County of Salt Lake)

I, GAYLE B. CAMPBELL, do hereby certify that I am a Registered Professional Reporter and Notary Public in and for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter and thereat reported in stenotype all of the testimony and proceedings had; that thereafter, my notes were transcribed into typewriting under my direction, and pages 1 through 22 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah this _____ day of July, 1987.

GAYLE B. CAMPBELL, R.P.R.

My Commission Expires:
6 January 1988